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9 Trustee in Bankruptcy

10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SANTA ROSA DIVISION**

13 In re GERARD Q. DECKER, IV aka ROD
14 DECKER,

15 Debtor.

16 Case No. 09-10655 AJ
17 Chapter 7

18 Date: April 30, 2010
19 Time: 9:00 a.m.
20 Place: 99 South "E" Street, Santa Rosa
21 Court: Hon. Alan Jaroslovsky

22 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
23 **SURCHARGE OF EXEMPTION**

24 John W. Richardson, Trustee in Bankruptcy of the estate of the above Debtor, files this
25 memorandum of points and authorities in support of his motion for an order surcharging the
26 Debtor's \$17,225 exemption asserted in a 33-foot Sea Ray power boat (the "Power Boat").

27 I. STATEMENT OF FACTS

28 Gerard Decker filed a voluntary petition for relief *pro se* on March 16, 2009. The Debtor
29 neglected to inform the Trustee that the holder of the first deed of trust against his residence (the
30 real property commonly known as 2030 Paradise Drive, Tiburon, California) had recorded and
31 served a notice of default and then a notice of sale before the Debtor filed his Chapter 7 petition.

32 The Trustee proceeded to collect assets for liquidation. The Debtor asserted that there was
33 sufficient equity in the real property to make the sale of other assets unnecessary. Although the
34 Trustee's proposed broker believed that the value of the real property was significantly less than
35 the Debtor asserted and the property was over-encumbered, the Trustee was willing to use another

1 broker to market the property for a time to determine whether it could be sold for a higher amount.

2 When the holder of the first deed of trust moved the Court for an order granting it relief
3 from the automatic stay, it misrepresented to the Trustee that it had not recorded a notice of
4 default before the Chapter 7 petition was filed, inducing the Trustee to believe that the creditor
5 was seeking relief to commence the foreclosure process. Because the Trustee had serious doubts
6 about the realizable value, he believed that four months would give him enough time to test the
7 market, and did not oppose the motion. The Debtor did not bother to inform the Trustee that a
8 notice of default had been recorded before he filed his Chapter 7 petition. In fact, the creditor had
9 recorded a notice of default and proceeded to record a notice of sale. A trustee's sale was held
10 within a few weeks after the relief from stay hearing. Because the foreclosure price was so low
11 (even less than the Trustee's proposed broker estimated), the Trustee concluded that there was no
12 damage to the estate, and abandoned any claims against the lender.

13 With the loss of the real property, the Trustee resumed his effort to liquidate other assets.

14 The Debtor hired counsel and amended his schedules to, among other things, reduce the
15 fair market value of a 33-foot Sea Ray power boat from \$55,000 to \$35,000, and assert a \$17,225
16 exemption in it under C.C.P. Section 703.140(b)(1) and (5). There were no grounds on which to
17 object to that exemption.

18 By letter dated September 23, 2009, the Trustee requested that the Debtor surrender the 33-
19 foot Sea Ray power boat and certain other assets. Exhibit A to the Declaration of Charles P.
20 Maher. By order dated September 29, 2009, the Court ordered the Debtor to surrender the 33-foot
21 Sea Ray power boat and other assets to the Trustee pursuant to 11 U.S.C. § 521(a)(4) within 10
22 days. Maher Declaration, Exhibit B. The Debtor did not comply.

23 By letter dated October 14, 2009, to the Debtor, the Trustee noted his failure or refusal to
24 comply with the order, and gave the Debtor another opportunity to voluntarily surrender the power
25 boat and other assets. Maher Declaration, Exhibit C. Eleven days later, counsel for the Trustee
26 received an e-mail from an attorney who had made an appearance on behalf of the Debtor. In the
27 e-mail, the attorney represented that the Debtor was formulating an offer to purchase the non-
28 exempt equity in the power boat, but would cooperate with the surrender of another boat and a

1 Ford Thunderbird. Declaration of Charles P. Maher, Exhibit D.

2 Counsel for the Debtor continued to represent that the Debtor intended to make an offer for
3 the non-exempt equity in the power boat. The Trustee believes counsel's representations were
4 sincere. E-mails were exchanged through January 22, 2010, at which point, the Trustee concluded
5 that the Debtor did not intend to make an offer. Authentic copies of e-mails from counsel are
6 attached to the Maher Declaration as Exhibits E, F, and G.

7 With the Debtor's failure to make an offer, the Trustee contacted his auctioneer to begin
8 the process of an auction. Counsel for the Trustee served notice of the auction on March 5, 2010.
9 Maher Declaration, Exhibit H. On the last day for filing and serving objections, the Debtor
10 requested a hearing on the proposed sale. Based on the "letter objection" filed the same day but
11 previously sent to the Trustee, it is clear that no offer for purchase of the non-exempt equity will
12 be forthcoming. The hearing on the objection is set for April 9, 2010.

13 During the period the Trustee was waiting to receive an offer from the Debtor, the Debtor
14 failed to pay the \$400 per month slip fee, thereby creating a Chapter 7 administrative debt in the
15 amount of \$2,404 as of March 1, 2010. Adding another \$400 for April, the debt is \$2,804. Maher
16 Declaration, Exhibit I. Had the Debtor made an offer in October 2009, as his counsel indicated he
17 would do, the Trustee would not have incurred any slip fees because he would have required the
18 Debtor to pay any such fees in addition to the purchase price. The Debtor also has not paid
19 anything for his use of estate property since the Trustee made demand for surrender on September
20 23, 2009.

21 II. ARGUMENT

22 The Trustee is seeking an order surcharging the Debtor's exemption for the slip fee, for
23 nominal rent of \$400 per month, and the legal fees incurred by the estate in response to the
24 Debtor's refusal to surrender the Power Boat to the Trustee.

25 There is no express statutory authority for surcharging a debtor's exemption. However, the
26 Ninth Circuit made clear in *Latman v. Burdette*, 366 F. 3d 774 (9th Cir. 2004), that a bankruptcy
27 court is vested with authority under its general equitable powers to surcharge an exemption to
28 prevent fraud on the court.

1 We hold that the bankruptcy court may equitably surcharge a
2 debtor's statutory exemptions when reasonably necessary both to
3 protect the integrity of the bankruptcy process and to ensure that a
4 debtor exempts an amount no greater than what is permitted by the
5 exemption scheme of the Bankruptcy Code.

6 *Latman*, 366 F.3d. at 786.

7 In *Latman*, the debtors filed a Chapter 13 petition which they voluntarily dismissed after
8 about three months. Four days after dismissal of the Chapter 13 petition, the debtors filed a
9 Chapter 7 petition. During the four-day interval, the Latmans sold a vehicle and a boat and
10 received \$8,500 in cash for them. On their Schedule B in the Chapter 7 case, the Latmans omitted
11 all of the proceeds of sale of these two items and, instead, listed only \$1,500 in cash.

12 The trustee in *Latman* requested that the Latmans account for the proceeds of sale. The
13 Latmans gave an inaccurate accounting. The Trustee filed an action for denial of the discharge
14 and obtained a judgment denying the discharge on summary judgment. Subsequently, the trustee
15 filed a motion to surcharge the debtor's exemptions to the extent of the loss of value of estate
16 property and for turnover of property. Specifically, the trustee sought to surcharge the wildcard
17 exemption, thereby rendering non-exempt certain assets the
18 Latmans had previously exempted. The bankruptcy court granted the trustee's motion.

19 The surcharge remedy fashioned by the bankruptcy judge
20 prevented what otherwise would have been a fraud on the
21 bankruptcy court and the Latmans' creditors caused by the
22 Latmans' non-disclosure of monies that should have been listed on
23 the bankruptcy schedules and available for the Latmans' creditors.

24 *Latman*, 366 F. 3d at 785.

25 The Latmans argued that the surcharge was inconsistent with their fresh start. The Ninth
26 Circuit rejected the argument, stating that the surcharge remedy did not punish the Latmans by
27 denying them the full value of their statutory exemptions. "Instead, the surcharge remedy
28 protected the Latmans' creditors by preventing the Latmans from sheltering *more* assets than
permitted by 11 U.S.C. § 522." *Id.*

29 The Ninth Circuit explained that the surcharge remedy ensured that the Latmans retained
30 only the full permitted value of their exemptions and nothing more.

1 Under exceptional circumstances, such as those presented here,
2 surcharge may be the only means fairly to ensure that debtors
3 retain their statutory “fresh start,” while also permitting creditors
4 access to property in excess of that which is properly exempted
5 under the bankruptcy code.

6 *Latman*, 366 F. 3d at 786.

7 The Bankruptcy Appellate Panel took the analysis one step further in *In re Onubah*, 375
8 B.R. 549 (9th cir. BAP 2007). In *Onubah*, the debtor disrupted the Chapter 7 trustee’s efforts to
9 sell real property which the debtor maintained as his residence. “Onubah’s efforts to obstruct the
10 sale, while unsuccessful, caused the bankruptcy estate to incur significant expenses.”

11 Although Onubah did not intend to keep assets by concealing them
12 from the Trustee, his misconduct was to the same end. Even
13 though he disclosed his residence, Onubah refused to turn it over
14 so the Trustee could sell it and realize the non-exempt equity for
15 the benefit of creditors. He sought to keep that non-exempt equity
16 for himself.

17 *Onubah*, 375 B.R. at 554.

18 A surcharge of exemptions does not hinge on the concealment of
19 assets. It requires misconduct that would cause “fraud on the
20 bankruptcy court and the [debtor’s] creditors.” *Latman*, 366 F. 3d.
21 at 785. This may include concealment of assets, but is not limited
22 to such cases. An unjustified refusal to turn over property of the
23 estate to the trustee may be the basis for surcharge of the debtor’s
24 exemptions. *Latman* 366 F. 3d. at 785 (citing *In re Ward*, 210
25 B.R. 531, 532 (Bankr. E.D. Va. 1997)).

26 *Onubah*, 375 B.R. at 554.

27 Before the Debtor’s residence was lost to foreclosure, the Debtor asserted that the net
28 equity in it was sufficient to pay all creditors in full, making unnecessary a sale of any other
assets, including the Power Boat. When it became obvious that sale of the Power Boat, a sail boat,
and a vehicle would be necessary, the Debtor did not voluntarily turn them over to the Trustee,
instead requiring the Trustee to obtain an order compelling the Debtor to comply with his statutory
obligation to surrender property to the Trustee under 11 U.S.C. § 521(a)(4). The Debtor did not
comply with the order.

29 It was only when the Trustee made an issue of the non-compliance and the Debtor
30 involved an attorney that the Debtor began his series of promises to make an offer to the Trustee

1 to purchase the non-exempt equity in the Power Boat from the estate. He did surrender the other
2 boat and the vehicle, which the Trustee sold, but never made an offer for the Power Boat.

3 When, after approximately four months of promises, the Debtor failed to present any offer,
4 the Trustee concluded that the Power Boat also had to be auctioned. In response to the Trustee's
5 sale notice, the Debtor filed an objection, not because he was ready to make an offer to purchase
6 the non-exempt equity, but to appeal to the Court for an unwarranted exception to Chapter 7
7 liquidation. The Debtor is not entitled to exempt the boat itself and did not attempt to do so in his
8 Amended Schedule C when he asserted a \$17,225 exemption in a \$35,000 asset.

9 The Trustee expects to sell the Power Boat and pay the exemption (in the amount allowed)
10 from the proceeds of sale.

11 Despite the Trustee's accommodation of the Debtor in providing him time in which to
12 formulate an offer to purchase the non-exempt equity, the Debtor stopped paying the \$400
13 monthly slip fee where the Power Boat was stored, resulting in a loss at this time of \$2,400 to the
14 estate. Had a sale taken place in October 2009 when the Debtor first promised he would make an
15 offer, the Debtor would have been liable for those monthly fees, not the estate. It is unfair to the
16 estate that it must pay those fees when the Debtor has, in effect, forced the estate to incur debt for
17 his benefit only. The Trustee believes that a surcharge for all slip fees while the Debtor is in
18 possession of the Power Boat is appropriate. The Debtor should also be liable for nominal rent of
19 \$400 for use of the boat since September 23, 2009, when the Trustee requested turnover.

20 The Debtor's delays, his refusal to surrender the Power Boat, his broken promises, and
21 what the Trustee believes is a bad faith objection to the sale have forced the Trustee to incur
22 attorney fees and costs. The Trustee believes it is appropriate to surcharge the Debtor's exemption
23 in the boat for an amount equivalent to the fees.

24 As the *Onubah* court stated, an award of attorney fees is consistent with the "American
25 Rule," under which attorney fees are not recoverable unless provided for by a contract or a statute,
26 or under an exception to the American Rule such as "when a losing party acts in bad faith." *Perry*
27 v. *O'Donnell*, 759 F. 2d. 702, 704 (9th Cir. 1985). ["We conclude that the bankruptcy court did not
28 abuse its discretion or misapplied the law when it awarded attorney fees as part of the surcharge of

1 Onubah's exemptions."] *Onubah*, 375 B.R. at 557.

2 Counsel for the Trustee spent .9 hours (\$436.50) preparing the application for an order
3 under Section 521, 2.4 hours (\$1,176) preparing documents in reply to the Debtor's objection to
4 the sale and, as of the date of this memorandum, 2.4 hours (\$1,176) in preparing this motion.

5 Declaration of Charles P. Maher, ¶ 10.

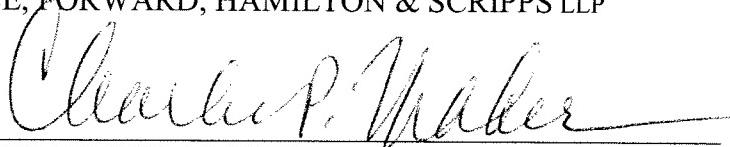
6 III. CONCLUSION

7 The Trustee asserts that a surcharge of the Debtor's exemption for \$2,804 in unpaid slip
8 fees, \$2,400 in rent, and \$2,788.50 in attorneys fees required in replying to the Debtor's objection
9 to the sale of the Power Boat and in bringing this motion should be granted.

10 DATED: April 2, 2010

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

11 By:


CHARLES P. MAHER

Counsel for Timothy W. Hoffman, Trustee

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